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Supreme Court, U.S.
FILED
SEP 25 1998
OFFICE OF THE CLERK

No. 97-1337

In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; MINNESOTA DEPARTMENT OF NATURAL RESOURCES; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, MINNESOTA DEPARTMENT OF NATURAL RESOURCES,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS AND LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

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The briefs filed by the Petitioner and its supporters do not inform the Court that the treaty rights at issue in this case were adjudicated and have been exercised for fifteen years in Wisconsin. The present case is a sequel to the Wisconsin litigation. Because the implementation of the treaty rights in Wisconsin belies arguments made about harm to the resource, economic disruption, and — most importantly — intrusions upon state sovereignty, the Respondents Bad River Band of Lake Superior Chippewa Indians and Lac du Flambeau Band of Lake Superior Chippewa Indians submit this brief telling the story of the litigation and implementation of treaty rights in Wisconsin.

STATEMENT OF THE CASE

The Bad River and Lac du Flambeau Bands adopt the Statements of the Case set forth in the briefs filed by the other Respondent Bands.

SUMMARY OF ARGUMENT

The Wisconsin Bands[1] secured judicial recognition of the continued vitality of their usufructuary rights under the 1837 treaty in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (*LCO I*), 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983), a case that also involved rights under an

1. The six Wisconsin Bands that are Respondents in this case and were plaintiffs in the *LCO* case are: the Bad River Band of Lake Superior Chippewa Indians, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa, Sokaogon Chippewa Community, and the St. Croix Chippewa Indians of Wisconsin. The Bad River and Lac du Flambeau Bands respectfully refer the Court to the briefs submitted by the other Wisconsin Bands, the Fond du Lac Band and the Mille Lacs Band for responses to Petitioners' full range of arguments.

1842 treaty not at issue here. *LCO I* held that the Chippewa bands in Wisconsin had treaty-secured rights to hunt, fish, and gather in the Wisconsin portion of the ceded territory.

These treaty rights were implemented in a series of court decisions and agreements of the parties which culminated in the entry of a final judgment in 1991. The story of the implementation of these rights is one of remarkable cooperation between the Wisconsin Bands and the State of Wisconsin that resolved almost all resource and regulatory issues. Beginning in 1983, the parties reached a series of interim agreements providing for the exercise of treaty rights which paved the way for the broader, final stipulations incorporated in the final judgment. Under these agreements, as well as the decisions of the court, the State of Wisconsin continues to be responsible for resource management, subject only to the legal constraints upon regulation of the exercise of treaty rights imposed by federal law. The court has not become an "appellate biologist"; the parties have not returned to court once since the final judgment.

The exercise of treaty rights in Wisconsin is highly regulated and closely monitored. In fifteen years of exercise of treaty rights in Wisconsin the tribal harvest has matured and peaked at a level short of the amount legally available to the Tribes. The resources are healthy, and the fish stocks in particular have benefitted from the increased biological monitoring and assessment work attendant upon the treaty right. In fact, attention to the fishery resource caused by the treaty rights has put state and tribal biologists on the cutting edge of resource management. Alarmist speculation about adverse economic impact has likewise proven unfounded.

The close cooperation between the State and the Tribes developed despite the abuse and harassment that the Chippewa

endured while exercising their rights, particularly from 1987 through 1990. This harassment interfered with tribal fishing and affected other areas of social interaction.

Early in 1991, the tide turned and the harassment ebbed. State officials denounced this harassment from the start, and local leaders also began speaking out. A treaty rights school curriculum was developed and taught in the public schools, criminal legislation was passed, an injunction was issued prohibiting harassment of Chippewas exercising the treaty right and local communities reached out to tribal leaders to build cooperation and trust.

Today, the Chippewa and their treaty rights are an accepted thread of the social fabric of northern Wisconsin. Cultural values have been articulated and debated, public knowledge and appreciation of Native Americans has increased, and the state's resources are better understood and more wisely managed. Tribes, too, have grown in governmental and natural resource capacity, and forged new links with the state and local communities. More fundamentally, the Tribes experienced a cultural and spiritual renaissance which brought them back full circle to the promises and understandings underlying the 1837 treaty that they could maintain their way of life.

These developments have had a positive effect upon Wisconsin, its resources, and all of its citizens. The lessons learned in Wisconsin have carried over into Minnesota, where the Chippewas' rights have been implemented cooperatively, peacefully, and without incident.

ARGUMENT

I.

THE CHIPPEWAS' 1837 TREATY RIGHTS WERE FIRST ADJUDICATED IN THE *LCO* LITIGATION.

The 1837 treaty rights were first upheld fifteen years ago in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* (*LCO I*), 700 F.2d 341 (7th Cir.), *cert. denied,* 464 U.S. 805 (1983).[2] Long before the present case was even filed, the Wisconsin Bands were exercising their treaty rights in Wisconsin. The *LCO* litigation dealt with the off-reservation usufructuary rights reserved to the Chippewa under both the 1837 treaty, Treaty with the Chippewa, July 29, 1837, 7 Stat. 536, and the 1842 treaty, Treaty with the Chippewa, October 4, 1842, 7 Stat. 591. About three-quarters of the 1837 treaty ceded territory is in Wisconsin. The 1842 ceded territory is located entirely in Wisconsin and the western Upper Peninsula of Michigan.[3]

LCO I held that the Chippewa reserved off-reservation treaty usufructuary rights to hunt, fish, and gather in the territory in Wisconsin ceded by the 1837 and 1842 treaties. The court examined the treaty language, the circumstances surrounding the treaties, and the understanding of the parties to conclude that the 1850 executive order was not authorized and invalid, and so did not extinguish the treaty rights. 700 F.2d at 361-364. The court also noted that attempts to remove the Chippewa were quickly abandoned, and the Chippewa were secured

2. Three Justices voted to affirm. *Id.*

3. A map depicting the areas of cession of these and other relevant treaties, Joint App. ("JA") 956, is reproduced in this brief as Appendix 1. Rights secured under the 1842 treaty are not at issue in this case.

permanent reservations within the ceded territory in the 1854 treaty, Treaty with the Chippewa, September 30, 1854, 10 Stat. 1109.[4]

Eleven years before *LCO I*, the Wisconsin Supreme Court also addressed the effect of the 1850 executive order in *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W. 2d 892 (1972), which upheld fishing rights in the Lake Superior waters adjacent to two Chippewa reservations.[5] In the course of doing so, it rejected the argument that the 1850 executive order terminated the previously reserved off-reservation rights. 53 Wis. 2d at 405-407, 192 N.W. 2d at 899-900. Fishing rights in the Lake Superior waters involved in *Gurnoe* have been exercised for the last 26 years and have been conducted under separate agreements between the Wisconsin Department of Natural Resources ("DNR") and the Tribes directly involved. *See Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1344 (6th Cir. 1993).

In reaching its decision in *LCO I*, the Seventh Circuit invoked and applied the canons of Indian treaty construction developed by this Court in over a century and a half of undisturbed jurisprudence. *LCO I*, 700 F.2d at 350-351. The canons are but a special application of familiar rules governing construction of contracts and treaties generally. *See* Brief of St. Croix Chippewa, *et al.* Treaty interpretation is based upon

4. The *LCO* litigation was not ignored by the lower courts in this case. The district court called *LCO I* "significant precedent for key issues in this case," Pet. App. ("PA") 303, and cited it frequently. *See also* PA 10 n. 3, 22 n. 19.

5. Although within the 1842 treaty ceded territory, the use of Lake Superior was excluded from the *LCO* litigation by stipulation of the parties. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO X*), 775 F. Supp. 321, 324 (W.D. Wis. 1991).

the treaty language, the history of the treaty, treaty negotiations, the surrounding circumstances, and the practical construction given it by the parties. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943). This was the approach of the Seventh Circuit in *LCO I*, 700 F.2d at 351, and of the lower courts in this case involving a much more complete record and lengthy trial. PA 36, 301-304.

Contrary to statements made by Minnesota and its supporters, the treaty rights at issue in *LCO* were ultimately held to be permanent rights subject to a Presidential authority exercisable only in narrow circumstances. *LCO I*, 700 F.2d at 352-355; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO III*), 653 F. Supp. 1420, 1426, 1430 (W.D. Wis. 1987). In affirming the continued vitality of the rights secured by the 1837 and 1842 treaties, the Seventh Circuit held that the rights were not terminated by settlement but can only be exercised on lands publicly available for the usufructuary activity in question at the time of the exercise of the right. *LCO I*, 700 F.2d at 365 and n.14; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO II*), 760 F.2d 177 (7th Cir. 1985). *See LCO III*, 653 F. Supp. at 1426; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO X*), 775 F. Supp. 321, 323 (W.D. Wis. 1991). The district court carefully addressed the standard for state regulation of the treaty rights, holding that the State could regulate in the interest of conservation, public health, or safety, provided its regulations met applicable legal standards. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO IV*), 668 F. Supp. 1233, 1242 (W.D. Wis. 1987). *See LCO X*, 775 F. Supp. at 324, 325. The lower courts reached the same conclusions in the present case. PA 57-58 n. 43, 70-72, 104-112, 205-206, 337-338, 344-345.

After the nature of the rights was defined by the Seventh Circuit in *LCO I* and *LCO II*, issues surrounding implementation of the rights, especially resource and regulatory issues, were

of the rights, especially resource and regulatory issues, were for the most part resolved between the parties. When final judgment was entered in 1991, *LCO X*, *supra*, neither side appealed.

II.

IMPLEMENTATION OF TREATY RIGHTS IN WISCONSIN SHOWS THAT THE RIGHTS DO NOT IMPINGE UPON THE STATE'S SOVEREIGNTY, HARM NEITHER THE RESOURCES NOR THE LOCAL ECONOMY, AND ARE AN ACCEPTED PART OF LIFE IN NORTHERN WISCONSIN.

We now turn to the story of implementation of treaty rights in Wisconsin, which contradicts many of the assertions made in support of Minnesota's equal footing argument.[6] The story will be told from court decisions, reports of congressional hearings, and law review articles. We will also rely upon matters of general knowledge as presented in a scholarly work on Wisconsin Chippewa treaty rights, a number of reports issued or coauthored by the State of Wisconsin, and other official sources. These are matters of which the Court may take judicial notice under Fed. R. Evid. 201(b), and we have lodged 20 copies of these materials with the Clerk's Office.[7] *See Muller v. Oregon*, 208 U.S. 412, 421 (1908). The materials lodged with the Court are listed in Appendix 2 of this brief.

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6. The equal footing doctrine is addressed in the Brief of the Fond du Lac and Red Cliff Bands. *See* Brief of Amici Tribes as well.

7. This practice is suggested in Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* (7th ed. 1993), pp. 555-557. Each party was also sent a copy of the materials.

A. The Wisconsin Bands and the State of Wisconsin Cooperate Extensively on Resource Management, and the State Retains Its Resource Management Authority.

From the outset, the Wisconsin Bands and the State of Wisconsin have cooperated on the implementation of treaty rights and the management of resources. This cooperation began in 1983 within a month after the decision in *LCO I* when discussions with the bands were initiated by the DNR Secretary. *Anti-Indian Violence, Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, House of Representatives, 100th Cong., 2d Sess. 396 (1988) ("*Hearings*").[8]

These discussions led to a series of interim agreements that provided for a limited exercise of treaty rights pending final disposition of the case. The first such agreement was reached in 1983, some eight years before final judgment was entered. The parties entered into several dozen such agreements, each of which generally covered a specific activity for a single season. *Hearings*, *supra*, at 397; Charles F. Wilkinson, *To Feel the Summer in the Spring: the Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 Wis. L. Rev. 375, 408 ("Wilkinson").[9] The agreements ran the entire gamut of the

8. The portion of the hearings pertaining to Wisconsin was held on May 18, 1988. Witnesses from the state perspective included the Wisconsin Attorney General, the head of the DNR's Enforcement Division, and a county sheriff. The tribal and state witnesses had no dispute on the facts. *Hearings*, *supra*, at 423.

9. The author is professor of law at the University of Colorado, managing editor of the leading Indian law treatise, Cohen, *Handbook of Federal Indian Law* (1982 ed.), coauthor of an Indian law casebook, Getches and Wilkinson, *Cases and Materials on Federal Indian Law* (2d ed. 1986), and author of *American Indians, Time and the Law* (Yale U. Press 1987).

major activities included in the treaty rights: deer hunting, ice fishing, trapping, summer and fall fishing, small game hunting, spring spearing (for fish), gathering wild rice, migratory bird hunting, and bear hunting. Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* 100 (Wisconsin Academy of Sciences, Arts and Letters 1991) ("Satz")[10]; Wilkinson, *supra*, at 408-409.

The interim agreements led to a close working relationship between the Tribes and the DNR — stormy at times, to be sure — as well as a meaningful exercise of the treaty rights. They were a marked departure from the past experience in other states. George Meyer, current Secretary of the DNR, stated in 1988, *Hearings*, *supra*, at 397: "The cooperation of tribal and state governments in the implementation of treaty rights prior to final court decisions we believe to be truly unprecedented in the United States."

When *LCO I* was decided in 1983, few of the Wisconsin Bands had natural resource scientists or the courts and law enforcement personnel needed for enforcing tribal ceded territory conservation laws. Since the interim agreements depended upon tribal enforcement under tribal law, the Tribes quickly established the tools needed for the task. *Hearings*, *supra*, at 397.

The Wisconsin Bands also helped to found the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), an intertribal

10. The author, Dean of Graduate Studies and Professor of American Indian History at the University of Wisconsin – Eau Claire, and a noted expert on the Removal era, was presented the Award of Merit from the State Historical Society of Wisconsin in 1992 for this book. *Id.* at endpaper. This book is included in the materials lodged with the Court.

consortium whose biologists and resource specialists helped the Tribes prepare for negotiations with the DNR, understand the resource issues involved, develop regulatory approaches, perform resource assessments, and monitor and evaluate harvests. GLIFWC also employs the conservation wardens needed to enforce tribal ceded territory conservation codes and provides funding for tribal courts. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VI*), 707 F. Supp. 1034, 1050, 1054 (W.D. Wis. 1989); Satz, *supra*, at 100, 109; U.S. Department of the Interior, *Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory* 21 (2nd ed. 1993) ("*Casting Light*").[11] The work of GLIFWC is also discussed in *Reich v. Great Lakes Indian Fish & Wildlife Comm.*, 4 F.3d 490 (7th Cir. 1993).

The cooperative experience gained through the interim agreements, together with the expertise available to the Wisconsin Bands through GLIFWC, paved the way for the final resolution of resource and harvest issues by stipulation of the parties. The district court adopted an issue-narrowing process proposed by the parties that resulted in the settlement of most implementation issues. Even the matters remaining in dispute were generally resolved either by stipulation or by the court on stipulated facts. *LCO VI*, 707 F. Supp. at 1038; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin* (*LCO VII*), 740 F. Supp. 1400, 1401-1402 (W.D. Wis. 1990).

11. The *Casting Light* study was funded by a federal appropriation secured by Sen. Daniel Inouye. Study and report participants included the Wisconsin DNR, GLIFWC, the U.S. Fish and Wildlife Service, Bureau of Indian Affairs, and the Wisconsin Bands. The report "provides an objective statement about the rights reserved by the Chippewa Indians, the status of the fishery resources, and the rights of the State of Wisconsin to use those resources." *Id.* at 13. It was signed by all participants, including the DNR Secretary and Sen. Inouye. The report is included in the materials lodged with the Court.

The stipulations covered all of the harvest activities included in the interim agreements, as well as the harvest of all other species, fish and game processing, gear marking and safety identification, enforcement issues, ceremonial use, and management authority. *See* Wilkinson, *supra*, at 408-409. The stipulations were incorporated in the final judgment. *LCO X*, 775 F. Supp. at 324-325.

On several occasions the district court described and praised the cooperation between the State and the Wisconsin Bands. For example, in *LCO VI*, 707 F. Supp. at 1052-1054, the court stated:

> What the parties in this case have done to give practical effect to plaintiffs' judicially recognized treaty rights is a remarkable story. It is remarkable in its own right; it is even more so when contrasted with the very different reaction by the State of Washington to the judicially recognized rights of the Indians in that state.
>
> * * *
>
> It is to this state's credit that its officials . . . chose . . . to work to adjust the state's resource management programs to accommodate the newly-recognized rights of the tribes. The effort has not been an easy one. The court orders [at the time] provided no real guidance for translating a treaty right into a harvest opportunity. . . . The [DNR] has had to develop much of its own information, either in-house or in conjunction with the State-Tribal Technical Working Group, an advisory group composed of biologists from the [DNR] and from [GLIFWC]. This group and the related Biological

Issues Group addressed biological problems put to them by state and tribal negotiators, developed strategies for harvests, performed assessments of different kinds of fishing and worked to narrow the scope of the biological issues that would have to be tried to the court. It is no exaggeration to say that in doing this, the biologists have been on the cutting edge of fisheries biology and management issues.

* * *

It is to the tribes' credit that they have adopted an equally cooperative attitude toward the implementation of their rights. It has not been an easy time for them, either. . . . GLIFWC has hired trained fisheries biologists who participate in [the committees mentioned above] that have produced the working papers and biological issues stipulations so helpful to the court, to treaty rights negotiators, and to fisheries managers.

* * *

Both the tribes and the officials of the State of Wisconsin responsible for implementing the tribes' treaty rights can take pride in their accomplishments over the last six years. They deserve widespread recognition and appreciation for their efforts.

The cooperation on biological and resource management issues continued after the litigation ended. *Casting Light*, *supra*, the joint federal, state and tribal report, concludes:

The tribal, state and federal managers have embarked upon one of the largest studies of fishing

ever conducted. They are using state-of-the-art methods and have collected a large pool of valuable information. They have established joint population goals and are standardizing assessment methods. . . . They are committed to management efforts that will assure that Northern Wisconsin's fishery resource remains one of the best protected and best managed in the country.

Id. at 93. The ongoing efforts of the parties are further documented in follow-up reports of the Joint Assessment Steering Committee. *See, e.g.,* U.S. Department of the Interior, *Casting Light Upon the Waters 1992 Accomplishment Report* (1993) ("*Accomplishment Report*"); U.S. Department of the Interior, *Fishery Status Update in the Wisconsin Treaty Ceded Waters* (1995) ("*Fishery Update*").[12]

State-tribal cooperation in Wisconsin helped pave the way for a similar approach in Minnesota. The Mille Lacs and Fond du Lac Bands are also members of GLIFWC and were able to tap its considerable institutional experience. In Minnesota, virtually all of the resource and management issues were settled by the parties. Many features of the Wisconsin stipulations were incorporated or built upon in the protocols and management plans implementing the 1837 treaty rights in Minnesota. PA 57 n. 43, 80-81.[13] As in Wisconsin, cooperation with the State has

12. Both of these reports are included in the materials lodged with the Court.

13. The Eight Circuit wrote in this case: "We commend particularly the State of Minnesota and the various Bands for their willingness to reach agreement regarding the valuable resources in the Conservation Code and Management Plan." PA 73. The Stipulation and Protocols are included in the Joint Appendix, JA 1727-1784. They detail state-tribal cooperation on resource matters and share many of the features of the Wisconsin stipulations described in this brief. *Cf.* Brief of Fond du Lac and Red Cliff Bands.

carried over into the implementation of the treaty rights. *See* J. Z. Grover, *One Cast Beyond: Tribal Fishery Management*, In-Fisherman, July-August 1998.[14] Following the first spring treaty fishing season, the head of the Minnesota DNR praised the "excellent working relationships" among tribal, GLIFWC, and DNR staffs. Letter from Sando to Kmiecik of 5/15/98. Similarly, at the conclusion of the first treaty deer hunting season in Minnesota, the manager of St. Croix State Park wrote congratulatory letters to the Mille Lacs and Fond du Lac Bands stating: "[Y]ou have laid the cornerstone on which to build a long term relationship based on common sense and cooperation." Letter from Nelson to Wedll of 11/18/97; Letter from Nelson to Martineau of 11/20/97.[15]

The Wisconsin experience, which has carried over into Minnesota, belies the claims made by Minnesota and the other states upon which they construct the equal footing argument. For example, Minnesota claims that it will "operate under perpetual federal court supervision" with the federal court functioning as an "appellate biologist." (Br. 37, 38) But in Wisconsin the parties have not returned to court on any resource issue in the seven years since final judgment was entered. The close cooperation of the parties in Minnesota suggests the same future there as well.

Minnesota also asserts that the treaty rights are incompatible with its ability to manage the resource (Br. 37) and that the right "carves out a significant slice of the State's core sovereign interests, and requires the state to share that area of sovereignty." (Br. 40) This is wrong as a general proposition, as shown in the Brief of the Fond du Lac and Red

14. This article is among the materials lodged with the Court.

15. These letters are included in the materials lodged with the Court.

Cliff Bands. In addition, the Wisconsin experience demonstrates that these concerns are overstated and misplaced, both in fact and in law. The *LCO* litigation made it quite clear that notwithstanding Chippewa treaty rights, Wisconsin retained sovereign responsibilities as resource manager. For example, in the dispute over the walleye harvest by spearers, the district court adopted — over strenuous tribal objection — the DNR's safety factor and quota process, *LCO VI*, 707 F. Supp. at 1055-1059, because the state had satisfied the conservation standard governing state regulation of tribal treaty rights. Moreover, in requiring exchange of biological information between the parties, the court said:

> The fact that plaintiffs may be regulating their members' exercise of their treaty rights does not make them the manager of the fisheries. That responsibility and authority remains the defendants'. They have the fiduciary obligation of managing the natural resources within the ceded territory for the benefit of current and future users.

Id. at 1060. Subject only to the conservation standard, the State retains authority to set safe harvest levels upon which tribal harvest quotas are based. *LCO X*, 775 F. Supp. at 323.

Similarly, the tribal deer harvest is accommodated within the State's overall management program, a system under which the DNR, in cooperation with GLIFWC biologists, sets a desired harvest level for the deer management units in the State. *LCO VII*, 740 F. Supp. at 1404-1405. The Tribes stipulated to this management system, which is but little disturbed by implementation of the treaty rights. *LCO VII*, 740 F. Supp. at 1401. The result is similar for the other resources and harvest activities.

The same is true in this case under the stipulations and protocols. Minnesota and the Tribes have stipulated that "[t]he state has a trust responsibility and authority to manage resources for the benefit of all current and future users consistent with the treaty harvest rights of the Bands," JA 1770, and have adopted a detailed protocol on information exchanges to enable the state to exercise that authority. JA 1755-1769. The district court declined to make an abstract ruling on management authority in the absence of a concrete dispute between the parties, PA 91-94, but concluded that state restrictions on tribal harvest based upon harvestable surplus determinations were subject to review under the "conservation" standard. PA 94-101. Minnesota did not appeal either ruling. To date the Tribes have not sought review of any harvestable surplus determinations. *See* JA 1771-1777, 1780-1784 (protocol provisions governing harvestable surplus determinations and methodologies).

Until it lent its name to the States' *amicus* brief in this case, Wisconsin had not voiced concerns about intrusions upon its sovereignty. To the contrary, Wisconsin officials have acknowledged and even trumpeted that the resource management authority of the State was preserved in the *LCO* litigation. For example, in his statement announcing Wisconsin's decision not to appeal from the final judgment, Wisconsin Attorney General James Doyle cited as one of the significant victories achieved by the State in the litigation that "[t]he state has the ultimate authority to protect and manage the resources of the ceded territory." Satz, *supra,* App. 9 at 196. Likewise *Casting Light*, *supra,* at 20, the report coauthored by the DNR, states:

> Judge Crabb has ruled that the management authority lies with the State and not with the tribes. The Court requires the State to manage the ceded territory fishery for the benefit of all current and future users. The tribes may challenge any State action that they believe infringes on their treaty rights.

There is nothing in the story of implementation of treaty rights in Wisconsin that is an affront to the State's sovereignty. The State and the Tribes have found a way to incorporate the tribal harvests into the State's management system. The ultimate legal responsibility for that management system remains with the State, subject only to the federally guaranteed treaty rights of the Chippewa bands.

B. The Treaty Harvest in Wisconsin Poses No Threat to the Resources or Economy of Northern Wisconsin.

Treaty rights in Wisconsin are governed by tribal regulations based upon the management regimes contained in the stipulations incorporated in the final judgment, *LCO X*. The tribal codes are enforced in the field through the cooperative law enforcement efforts of the DNR and GLIFWC wardens, and violators are prosecuted in tribal courts. Harvest levels are established cooperatively for each species that requires them and, where harvest levels are established, the harvest is monitored to assure they are not exceeded. The two most extensive Chippewa harvest activities are whitetailed deer hunting and spring spearing for walleye. The harvest regimes for these activities illustrate the careful regulation and close monitoring that have ensured a healthy resource base.

The tribal deer harvest is accommodated within the State's highly developed management scheme. The DNR, in consultation with GLIFWC biologists, sets a harvest target for each of its deer management units. These targets are forwarded to the Tribes, which then make declarations to the DNR of their

intended harvest in each management unit in the ceded territory. The declarations cannot exceed the maximum treaty entitlement for a unit. The State then adjusts the number of antlerless deer permits available in each unit for state-licensed hunters, if necessary, in light of the anticipated tribal harvest. Tribal hunters are issued permits by the Tribes and are required to tag and register every deer killed. *See LCO VII*, 740 F. Supp. at 1403 *f.*

Tribal spring spearing is even more highly regulated. Most spring spearing takes place during a period of about fifteen days that begins shortly after "ice out," when the walleye are congregated for spawning. The spearer stands in the bow of a small boat, illuminating the water with a bright light shone from either below or above, while another person operates the boat. The spring spearing season is usually over before the beginning of the state angling season. *LCO VI*, 707 F. Supp. at 1039-1042. *See Casting Light*, *supra*, at 55-62.

Each year safe harvest levels for walleye and muskellunge are set for each lake in the ceded territory available for spearing, from which the maximum allowable tribal harvest is calculated for each lake. The Tribes then declare the lakes where they intend to spear and the amount of fish, within their harvest limit, that they intend to take from each lake. *LCO VI*, 707 F. Supp. at 1059-1060. *See Casting Light*, *supra*, at 55-62.

Spearing is regulated through a nightly permitting system, a bag limit per permit, designation of a single boat landing for use on each lake, dockside monitoring of the entire catch by GLIFWC wardens and creel clerks (who count and measure every fish taken), and a host of other regulations designed to prevent overexploitation. Permit quotas are adjusted daily based upon the previous night's harvest. One would be hard pressed to identify a more highly regulated or closely monitored fishery.

LCO VI, 707 F. Supp. at 1047-1052. *See* Wisconsin Legislative Reference Bureau Bulletin 91-1, *Chippewa Off-Reservation Treaty Rights: Origins and Issues* 14 (1991) ("Wis. LRB");[16] *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse - Wisconsin, Inc.*, 843 F. Supp. 1284, 1286-1287 (W.D. Wis. 1994), *aff'd*, 41 F.3d 1190 (7th Cir. 1994), *cert. denied*, 514 U.S. 1096 (1995). The regulatory and monitoring regime employed in Wisconsin is similar to that in Minnesota under the Bands' Conservation Code and Management Plan, as well as the stipulation and protocols. *See* Scott Bestul, *In Minnesota: A New Era for Mille Lacs Walleye*, Field and Stream, May 1998, at 140.[17]

The close monitoring of these activities guarantees solid data on tribal harvest, which in turn enhances the ability of the State and Tribes to better manage the resources. The level of tribal harvest has not posed any threat of harm to the resources upon which they depend. The tribal harvest levels have fallen short — in fact, in most instances well short — of the maximum available under the treaty allocation.

> The Chippewa deer harvest . . . is minimal compared either to the entire deer population or to the harvest by state-licensed hunters; it is smaller even than the annual road kill in the ceded territories. . . . Similarly, Chippewa spring spear fishing . . . has never come close to approaching the impact that sportfishing has on the fish population in northern Wisconsin.

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16. The Legislative Reference Bureau is the research arm of the Wisconsin Legislature. This document is included in the materials lodged with the Court.

17. This article is among the materials lodged with the Court.

Satz, *supra*, at 112-113. The tribal treaty harvest "remains well under the safe harvest." Wilkinson, *supra*, at 377. *See Accomplishment Report, supra.*

The result has been a healthy resource base unimpaired by the exercise of treaty rights. In *Casting Light*, *supra*, the state, federal, and GLIFWC biologists came to two basic conclusions: "NO! – Chippewa spearing has not harmed the resource; and YES! – the fish population in the ceded territory is healthy." *Id.* at 13 (emphasis in original). *See* Wis. LRB, *supra,* at 14-15; Wilkinson, *supra,* at 376-378. The report also concludes that the tribal harvest is "conservative and completely monitored" and that "lakes with tribal harvest are studied and monitored more than lakes without tribal quotas." *Casting Light*, *supra*, at 78.

The Wisconsin Bands have also taken extraordinary steps to limit the impact of spearing on their neighbors. They have consistently declared walleye harvest levels well below their maximum entitlement in order to allow angler daily bag limits of three or more fish. *Casting Light*, *supra,* at 81; *Fishery Update*, *supra,* at 9; Satz, *supra,* at 111. They have avoided spearing lakes for two consecutive years at the level that would trigger a one year fishing closure. *Fishery Update*, *supra,* at 9. The Wisconsin Bands also take a large and active role in fish rearing and stocking programs both on and off the reservation. Satz, *supra,* at 111. In 1990 walleye production by the Wisconsin Bands was almost 25% of the State's walleye production, with more tribal hatchery and fish rearing capacity under construction. *Casting Light*, *supra,* at 69-70. "All of those fish were stocked in lakes and rivers accessible to state licensed anglers." *Id.* at 70. For example, the Lac du Flambeau Band has an extensive fish hatchery and rearing program and stocks the waters of its reservation, where non-Indians take over 90% of the harvest. Satz, *supra*, at 111. They also make fish available for off-reservation stocking. *Id.*

Opponents of treaty rights continue to raise the specter of unregulated Indian hunting and fishing leading to resource depletion. For example, the counties allude to depletion of fish stocks and the "very real potential for over-exploitation." (Br.10, 47) In fact, treaty rights are heavily regulated and closely monitored. Fifteen years of Wisconsin experience with the actual exercise of the rights involved in this case has demonstrated that tribal harvest levels have posed no threat to the resource and that the fishery resource in Wisconsin remains healthy.

Nor has the implementation of treaty rights caused any economic harm to northern Wisconsin. On the contrary, state and local authorities report that its tourism-based economy is doing well. During the height of the spring spearing protests, *see* Section C, *infra*, Wisconsin tourism director Dick Matty reported that there was "no real negative impact" on tourism, and Chamber of Commerce officials in the areas of heaviest spearing activity reported that tourism was "thriving." Satz, *supra*, at 113. Reports issued by the Wisconsin Department of Development also show that tourism is flourishing. Wis. LRB, *supra*, at 17.

C. Chippewa Treaty Rights Are an Accepted Part of Life in Wisconsin That Has Yielded Many Positive Benefits.

The cooperative resolution of resource and management issues in Wisconsin described above is, as the district court said, a "remarkable story." *LCO VI*, 707 F. Supp. at 1052. It is even more remarkable when placed in its social context, for at the very time that the final stipulations on resource issues were being negotiated, the Chippewa in Wisconsin were the target of protest activity that peaked between 1988 and 1990. Cooperation between the State and the Tribes thrived despite — one is almost tempted to say because of — that protest. The

broader context illustrates the soundness of the Court's "conservation" regulation standard, which has led to the degree of state-tribal cooperation demonstrated in Wisconsin despite social forces which sought, at least for awhile, to dictate a different and surely less desirable result.

The Wisconsin Chippewa paid a price for their treaty rights which was aptly described by the district court:

> The Tribes and their members have been subjected to physical and verbal abuse over the recognition of their treaty rights, most publicly when they have attempted to exercise their treaty right to spearfish, but not only then. Harassment has become a fact of life for them.

LCO VI, 707 F. Supp. at 1054. The details of the story are told in Satz, *supra*, at 101-124; *Hearings*, *supra*, at 125-427; and in Wisconsin Advisory Committee to the U.S. Civil Rights Commission, *Discrimination Against Indians in Northern Wisconsin* (1989) ("WAC Report").[18] Mercifully, this period is now in the past.

Many persons had sincere concerns about treaty rights and were worried about resource depletion and harm to the local economy. However, a minority of northern Wisconsin's citizens briefly succumbed to a latent bigotry underlying these concerns and attempted to physically interfere with the exercise of the treaty right. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse – Wisconsin, Inc.*, 843 F. Supp. at 1288 (injunction issued under 42 U.S.C. § 1982 restraining physical interference with the exercise of treaty rights). Their

18. This document is contained in the materials lodged with the Court.

activities were quickly condemned by State officials. *See Hearings*, *supra*, at 389. In addition, in some areas local officials and citizens intervened on behalf of the Chippewa. For example, in one locale "Chamber of Commerce members not only asked area residents to honor the spearing rights . . . , but they also manned two boats and accompanied the spearfishers to help promote calm." Satz, *supra*, at 126. Nevertheless, for a time racial tensions affected many aspects of tribal life and general social interaction in the North Woods. *Hearings*, *supra*, *passim*; WAC Report, *supra*, *passim*.

Beginning in 1991 the protest activities ebbed. The most recent chapter of the Wisconsin story is a happy one. Religious and political leaders, the Tribes themselves, educators, and — most importantly — ordinary citizens of northern Wisconsin rose to combat ignorance with facts, prejudice with understanding. A treaty rights support group, Honor Our Neighbors' Origins and Rights (HONOR), was organized and has since expanded into a nationwide organization active on Indian issues today. Satz, *supra*, at 115-116. Major public education efforts by the State, Tribes, GLIFWC, religious groups, and others helped to increase public understanding, which in turn brought general acceptance of treaty rights. Racial prejudice became socially unacceptable in northern Wisconsin. Today, the Chippewa are left free to pursue their harvest activities unimpeded. This has been carried over into Minnesota, where the exercise of treaty rights has likewise been peaceful and unimpeded. *See* Sando letter and Nelson letters, *supra*.

Cooperation between Indians and non-Indians has increased across the board as a result of implementing treaty rights and dealing with the protest. Tribal-state cooperation on biology and harvest management has grown, both in Wisconsin and in Minnesota. In addition, law enforcement cooperation has increased with the cross-deputization of tribal and local police

officers, and of DNR and GLIFWC wardens. In Wisconsin Tribes have teamed up with their local Chambers of Commerce in joint tourism promotion, and at least twelve local Chambers in northern Wisconsin issued a joint statement recognizing the treaty rights of the Chippewa. Satz, *supra*, at 125-128. The Bad River and Red Cliff Bands have combined forces with a local Chamber of Commerce, resort owners, and sport fishers to form Fish For the Future. This joint project uses volunteers and tribal biologists to collect eggs from speared walleye, which are then incubated in tribal hatcheries and stocked in area waters. Wis. LRB, *supra*, at 18.

The Wisconsin Legislature has also forged new ties with Indian people. Wis. Stat. § 29.223(2)(a), prohibits interference with lawful hunting, fishing, and trapping activity. *See State v. Bagley*, 164 Wis. 2d 255, 474 N.W. 2d 761 (Wis. App. 1991). 1989 Wis. Act 31 weaves the teaching of American Indian history, culture and tribal sovereignty into the school curriculum of Wisconsin's public schools "at least twice in the elementary grades and at least once in the high school grades." Wis. Stat. § 121.02(1)(L)(4). The curriculum was implemented in the 1991-1992 school year. Wis. LRB, *supra*, at 17; Satz, *supra*, at 126. The Wisconsin Legislature has also enacted the nation's most sweeping full faith and credit legislation for tribal court judgments. 1991 Wis. Act 43.

The Wisconsin Bands have grown as governments, as they have enhanced tribal codes, strengthened tribal courts, and actively enforced tribal law. *Hearings*, *supra*, at 401. They have also gained valuable experience in resource management that has been put to good use in conserving natural resources for everyone. GLIFWC has become a crucial intertribal institution. Its respected scientific and resource management capabilities, amply reflected in *Casting Light*, *supra*, and later studies, have made it and the Wisconsin Bands a respected voice in resource matters extending well beyond the regulation of treaty rights.

Even more fundamentally, there has been a spiritual and cultural revival among the Wisconsin Chippewa, a sense of identity and pride forged during their struggle for recognition and acceptance of their treaty rights. This has reinforced the Chippewa connection with the way of life guaranteed by the 1837 Treaty. At treaty time the Chippewa of the ceded territory were pursuing the traditional lifeway that had been theirs from time beyond memory, living off the land in a seasonal round of hunting, fishing, trapping, harvesting wild rice, making maple sugar, and gathering other fruits of the land. *LCO I*, 700 F.2d at 344; *LCO III*, 653 F. Supp. at 1424-1428; PA 222-223. These activities not only constituted tribal subsistence, but also defined their culture and a lifeway without which the Chippewa would lack identity. Satz, *supra*, at 1-2. *See* PA 150, 235.

At the time of the treaty, then, in both a material and a cultural sense, these usufructuary activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). As the Chippewa chief *Aish-ke-bo-gi-ko-zhe* (Flat Mouth) pointedly observed during the 1837 treaty negotiations:

> Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and rivers. . . . You know we can not live, deprived of our Lakes and Rivers. . . . The Great Spirit above, made the Earth, and causes it to produce, which enables us to live.

JA 75-76.

Today, the usufructuary activities no longer form the whole of tribal subsistence (though they remain important). But they

still inform the cultural identity of the Tribes. Today, the activities guaranteed by the treaty "still remain an important part of the culture, lifestyle, and economy of Band members." PA 326.

> As a Lac du Flambeau Chippewa Indian commented in the summer of 1989, "spearing fish in the spring is what got me in touch with my heritage. Part of it meant food. Getting food on the table to eat, to live. But part of it, connected to eating and living, is being Chippewa." Indeed, Chippewas argue that *they* are "the endangered species" in northern Wisconsin. "If we give up our ways," they contend, "we die".

Satz, *supra*, at 116 (citation omitted) (emphasis in original).

The implementation of treaty rights in Wisconsin has had a positive effect upon the State, its resources, and all of its citizens, but most of all upon the Chippewa who, in an important way, have been reconnected with the wellspring of their cultural identity. Indeed, the leaders of the Wisconsin Bands announced their decision not to appeal the final *LCO* judgment "secure in the conviction that they have preserved these rights for the generations to come." Satz, *supra*, at 193.

CONCLUSION

In announcing the State's decision not to appeal from the final judgment in *LCO*, Wisconsin Attorney General James Doyle said:

> I have been impressed with the many ways in which the citizens of northern Wisconsin . . . tribal and non-tribal . . . have been working together to bring about economic development and cultural understanding. . . . I'm proud of what I've seen and the cooperation in the north convinces me even more that it is time to move on.

Satz, *supra*, at 196. The State and the Wisconsin Bands have indeed moved on — on to a better understanding of and closer cooperation with each other in a way that imposes but lightly upon the State and its citizens. Both the State and Tribes are better for it.

The Eighth Circuit decision in this case should be affirmed in all respects.

Respectfully submitted,

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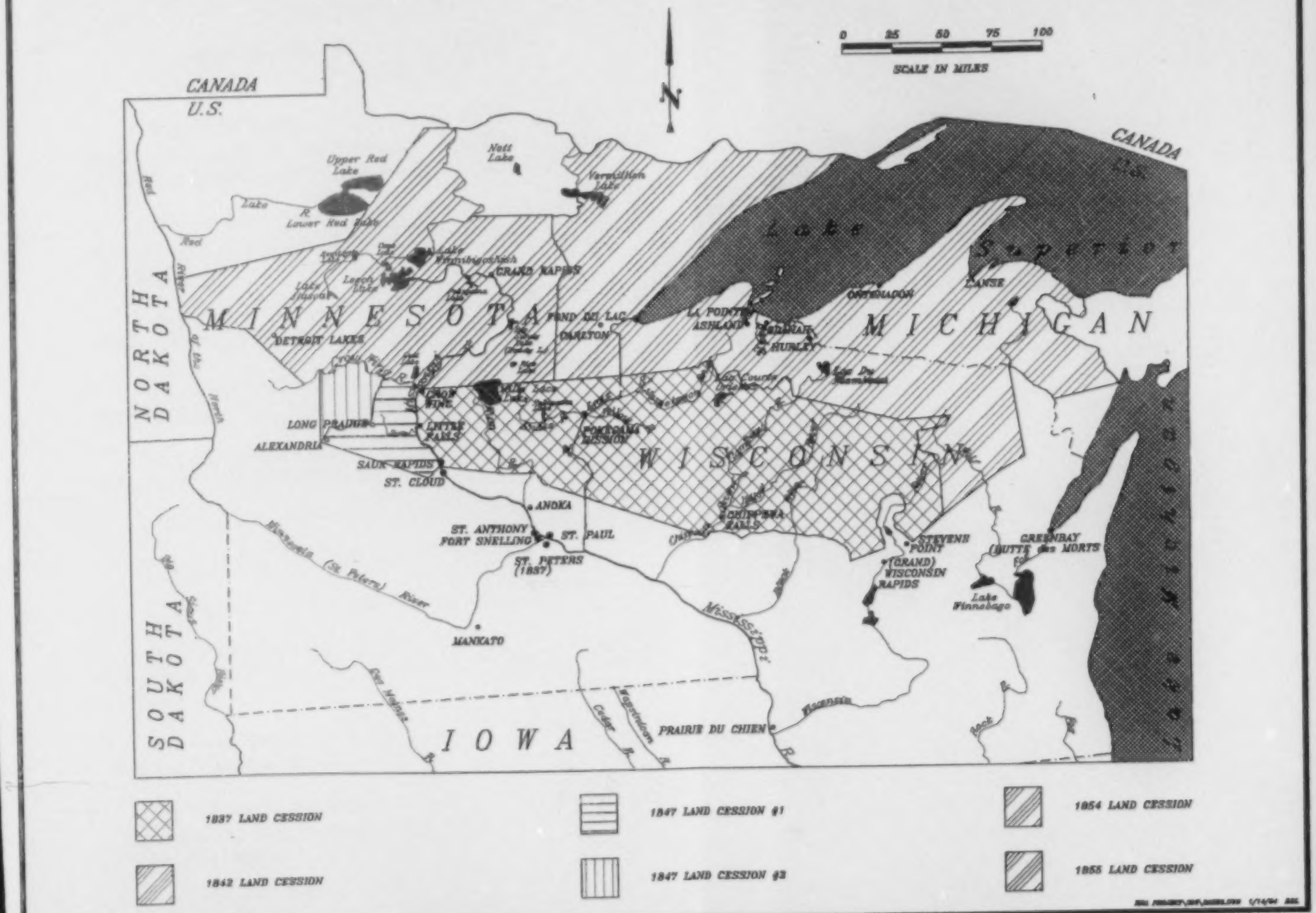
APPENDIX

APPENDIX

APPENDIX A — CHIPPEWA LAND CESSIONS, 1837-1855 (DEFS. EXH. 1, PAGE 13; JOINT APPENDIX PAGE 956)

CHIPPEWA LAND CESSIONS, 1837–1855



APPENDIX B — MATERIALS LODGED WITH THE COURT

(Omitted here but submitted separately as Lodging Appendix)

1. Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* (Wisconsin Academy of Sciences, Arts and Letters 1991).

2. U.S. Department of the Interior, *Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territory* (1991).

3. U.S. Department of the Interior, *Casting Light Upon the Waters 1992 Accomplishment Report* (1993).

4. U.S. Department of the Interior, *Fishery Status Update in the Wisconsin Treaty Ceded Waters* (1995).

5. J. Z. Grover, *One Cast Beyond: Tribal Fishery Management*, In-Fisherman, July-August 1998.

6. Letter from Sando to Kmiecik of 5/15/98.

7. Letter from Nelson to Wedll of 11/18/97.

8. Letter from Nelson to Martineau of 11/20/97.

9. Wisconsin Legislative Reference Bureau Bulletin 91-1, *Chippewa Off-Reservation Treaty Rights: Origins and Issues* (1991).

10. Scott Bestul, *In Minnesota: A New Era for Mille Lacs Walleye*, Field and Stream, May 1998

11. Wisconsin Advisory Committee to the U.S. Civil Rights Commission, *Discrimination Against Indians in Northern Wisconsin* (1989).